

## **Section 8**

### **Ethical Issues in Litigation Preparation**

**ABA MODEL RULES OF PROFESSIONAL CONDUCT**

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**RESTATEMENT OF THE LAW GOVERNING LAWYERS**

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## **ABA MODEL RULES OF PROFESSIONAL CONDUCT**

### **RULE 3.1 Meritorious Claims and Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which may include a nonfrivolous argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[*Ed. Note:* Black's Law Dictionary defines "frivolous" as "A pleading clearly insufficient on its face." The Oxford Universal Dictionary defines it as: "[A] Manifestly futile [law pleading]."]

### **RULE 3.2 Expediting Litigation**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

#### *Comment*

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

### **RULE 3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In trial, \*\*\*

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

#### **RULE 4.1 Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

#### *Comment*

##### Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

##### Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a

transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

#### **RULE 4.3 Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

#### **RULE 4.4 Respect for Rights of Third Persons**

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document and know or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

#### **RULE 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, and the law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

#### **RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

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### **RESTATEMENT OF THE LAW GOVERNING LAWYERS**

#### **Section 11 A Lawyer's Duty of Supervision**

(1) A lawyer who is a partner in a law-firm partnership or a principal in a law firm organized as a corporation or similar entity is subject to professional discipline for failing to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to applicable lawyer code requirements.

(2) A lawyer who has direct supervisory authority over another lawyer is subject to professional discipline for failing to make reasonable efforts to ensure that the other lawyer conforms to applicable lawyer-code requirements.

(3) A lawyer is subject to professional discipline for another lawyer's violation of the rules of professional conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(b) the lawyer is a partner or principal in the law firm, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial

measures.

(4) With respect to a nonlawyer employee of a law firm, the lawyer is subject to professional discipline if either:

(a) the lawyer fails to make reasonable efforts to ensure:

(i) that the firm in which the lawyer practices has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(ii) that conduct of a nonlawyer over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer; or

(b) the nonlawyer's conduct would be a violation of the applicable lawyer code if engaged in by a lawyer, and

(i) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct; or

(ii) the lawyer is a partner or principal in the law firm, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial measures.

### **Section 58 Vicarious Liability**

(1) A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.

(2) Each of the principals of a law firm organized as a general partnership without limited liability is liable jointly and severally with the firm.

(3) A principal of a law firm organized other than as a general partnership without limited liability as authorized by law is vicariously liable for the acts of another principal or employee of the firm to the extent provided by law.

### **Section 98 Statements to a Nonclient**

A lawyer communicating on behalf of a client with a nonclient may not:

(1) knowingly make a false statement of material fact or law to the nonclient,

(2) make other statements prohibited by law; or

(3) fail to make a disclosure of information required by law.

*Comment:*

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c. Knowing misrepresentation. The law of misrepresentation applies to lawyers. . . . For purposes of common-law damage recovery, reckless as well as knowing misrepresentation by a lawyer may be actionable. . . . A misrepresentation can occur through direct statement or through affirmation of a misrepresentation of another, as when a lawyer knowingly affirms a client's false or misleading statement. A statement can also be false because only partially true. If constrained from conveying specific information to a nonclient, for example due to confidentiality obligations to the lawyer's client, the lawyer must either make no representation or make a representation that is not false. . . .

A knowing misrepresentation may relate to a proposition of fact or law. Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. . . . Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind. Assessment depends on the circumstances in which the statement is made, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communication between the persons involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances. In general, a lawyer who is known to represent a person in a negotiation will be understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer's client. Subject to such an understanding, the lawyer is not privileged to make misrepresentations described in this Section.

A lawyer may also be liable under civil or criminal law for aiding and abetting a client's misrepresentation (see Section 8). A lawyer representing a client in a transaction with respect to which the client has made a misrepresentation is not free, after the lawyer learns of the misrepresentation, to continue providing assistance to the client as if the misrepresentation had not been made when the lawyer's continued representation of the client would induce the nonclient reasonably to believe that no such misrepresentation has occurred. . . .

d. Subsequently discovered falsity. A lawyer who has made a representation on behalf of a client reasonably believing it true when made may subsequently come to know of its falsity. An obligation to disclose before consummation of the transaction ordinarily arises, unless the lawyer takes other corrective action. See Restatement Second, Agency Sec. 348, Comment c; Restatement Second, Contracts Sec. 161(a)

(nondisclosure as equivalent to assertion when person "knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material"). Disclosure, being required by law (see Sec. 63), is not prohibited by the general rule of confidentiality (see Sec 60). Disclosure should not exceed what is required to comply with the disclosure obligation, for example by indicating to recipients that they should not rely on the lawyer's statement. On permissive disclosure to prevent or rectify a client's wrongful act, see Secs. 66-67.

e. Affirmative disclosure. In general, a lawyer has no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient. Applicable statutes, regulations, or common-law rules may require affirmative disclosure in some circumstances, for example disciplinary rules in some states requiring lawyers to disclose a client's intent to commit life-threatening crimes or other wrongful conduct. . . .

## **Section 106 Dealing with Other Participants in Proceedings**

In representing a client in a matter before a tribunal, a lawyer may not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that are prohibited by law.

*Comment:*

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b. Investigating and tape recording witnesses. A lawyer may conduct an investigation of a witness to gather information from or about the witness. Such an investigation may legitimately address potentially relevant aspects of the finances, associations, and personal life of the witness. In conducting such investigations personally or through others, however, a lawyer must observe legal constraints on intrusion on privacy. The law of some jurisdictions, for example, prohibits recording conversations with another person without the latter's consent. When secret recording is not prohibited by law, doing so is permissible for lawyers conducting investigations on behalf of their clients, but should be done only when compelling need exists to obtain evidence otherwise unavailable in an equally reliable form. Such a need may exist more readily in a criminal-defense representation. In conducting such an investigation, a lawyer must comply with the limitations of Section 99 prohibiting contact with represented person, of Section 102 restricting communication with persons who owe certain duties of confidentiality to others, and of Section 103 prohibiting misleading an unrepresented person.



## **Section 110 Frivolous Advocacy**

(1) A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

(2) Notwithstanding Subsection (1), a lawyer for the defendant in a criminal proceeding or the respondent in a proceeding that could result in incarceration may so defend the proceeding as to require that the prosecutor establish every necessary element.

(3) A lawyer may not make a frivolous discovery request, fail to make a reasonably diligent effort to comply with a proper discovery request of another party, or intentionally fail otherwise to comply with applicable procedural requirements concerning discovery.

### *Comments*

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d. Frivolous positions in litigation. A frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it. A nonfrivolous argument includes a good-faith argument for an extension, modification, or reversal of existing law. Whether good faith exists depends on such factors as whether the lawyer in question or another lawyer established a precedent adverse to the position being argued (and, if so, whether the lawyer disclosed that precedent), whether new legal grounds of plausible weight can be advanced, whether new or additional authority supports the lawyer's position, or whether for other reasons, such as a change in the composition of a multi-member court, arguments can be advanced that have a substantially greater chance of success.

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e. Abusive discovery practice. As stated in Subsection (3), a lawyer may not, in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a proper discovery request of another party. Frivolousness is determined under the standard stated in Comment d. Whether a lawyer complying with a discovery request has made a reasonably diligent effort is determined by an objective standard. In any response, the Section permits a lawyer to assert on behalf of the client any nonfrivolous basis for noncompliance. A lawyer must not, for example, delay a discovery response beyond the time permitted by law without adequate justification, provide answers to discovery requests that the lawyer knows to be false and misleading, or knowingly withhold discoverable information in responding to proper requests for such material. Procedural rules (see generally Comment c) may impose more stringent standards for making or responding to discovery requests.

## **Section 116 Interviewing and Preparing a Prospective Witness**

- (1) A lawyer may interview a witness for the purpose of preparing the witness to testify.
- (2) A lawyer may not unlawfully obstruct another party's access to a witness.
- (3) A lawyer may not unlawfully induce or assist a prospective witness to evade or ignore process obliging the witness to appear to testify.
- (4) A lawyer may not request a person to refrain from voluntarily giving relevant testimony or information to another party, unless:
  - (a) the person is the lawyer's client in the matter; or
  - (b) (i) the person is not the lawyer's client but is a relative or employee or other agent of the lawyer or the lawyer's client, and (ii) the lawyer reasonably believes compliance will not materially and adversely affect the person's interests.

### **Comment**

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b. Preparing a witness to testify. Under litigation practice uniformly followed in the United States, a lawyer may interview prospective witnesses prior to their testifying. A prospective witness is generally under no obligation to submit to such an interview. As a practical matter, rules requiring inquiry to support factual allegations in a complaint or other document (see Section 110, Comment c) may require a lawyer to interview witnesses to gain the necessary factual foundation. Competent preparation for trial (see generally Section 52(1)) (general negligence standard might also require pre-testimonial interviews with witnesses).

The work-product immunity (see Chapter 5, Topic 3) and the obligation of confidentiality regarding trial-preparation material (see Section 60(1)), result in the process of witness preparation normally being confidential. Compare Section 80(2)(b) (loss of confidentiality of material otherwise protected by attorney-client privilege); Section 92(1) (same for work-product immunity).

Attempting to induce a witness to testify falsely as to a material fact is a crime, either subornation of perjury or obstruction of justice, and is ground for professional discipline and other remedies (see Section 120, Comment I). It may also constitute fraud, warranting denial of the attorney-client privilege to client-lawyer communications relating to preparation of the witness (see Section 82).

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this

Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact (see Section 120(1)(a)).